in law or a properly shown case of newly discovered evidence, the court would unquestionably vacate the judgment and grant the new trial to the United States.

This need not be dependent upon any direct statutory enactment as to new trials nor upon any rule before published.

> It is not essential that any court in establishing or changing its practice should do so by the adoption of written rules. Its practice may be established by a uniform mode of proceeding for a series of years, and this forms the law of the court.
>
> How can the practice of the court be better known or established than by its own solemn adjudication upon the subject? (*Duncan* v. *United States*, 7 Pet., 435, 451; *United States* v. *Halstead*, 10 Wheat., 55, 61.)

In any matter that arose before it, in this regard, the court would observe the same rule of procedure, whether an application for new trial was made by the claimant or the defendant. The right, established by the statute to the claimant, would be recognized by every court as inuring to the other party, in all individual cases, unless expressly prohibited. It will be observed hereafter that it would absolutely be retained to the sovereign.

This grant of power is the same as that given to the courts of the United States ever since the judiciary act of 1789. Congress has enabled the courts to regulate their practice by that and subsequent laws. These are found in the Revised Statutes, sections 917 and 918, and in all statutes since, constituting courts and providing for additional jurisdictions. The authority and propriety of these laws has been recognized and determined by uni-

form decisions of this court. (*Wayman* v. *Southard*, 10 Wheat., 1; *Bank of the United States* v. *Halstead*, id., 51; *Ex parte Boyd*, 105 U. S., 651; *Fink* v. *O'Neil*, 106 U. S., 278; *Russell* v. *McLellan*, 3 Wood & M., 157, and numerous other cases.

This power to regulate practice may be exercised by Congress itself or delegated to the courts. In truth it has been partially done by the legislature and partially delegated to the courts in many cases. Chief Justice Marshall, in the case of *Wayman* v. *Southard* (*Sup.*), said:

> The seventeenth section of the judiciary act, and the seventh section of the additional act, empower the courts respectively to regulate their practice. It certainly will not be contended that this might not be done by Congress. The courts, for example, may make rules directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description. It will not be contended that these things might not be done by the legislature, without the intervention of the courts, yet it is not alleged that the power may not be conferred on the judicial department.

Consequently, in continuation of this habitual manner of legislation, when Congress conferred upon the Court of Claims, by act of June 16, 1880, jurisdiction of claims against the District of Columbia (c. 243, 21 Stat., 284), it was enacted in the third section that the Attorney-General is authorized to defend the District of Columbia, with the same power to interpose counter claims and offsets against claims and defenses for fraud practiced or

attempted, and all other legal defenses, and with like power of appeal, as in cases against the United States tried in said court. And by the fourth section: All laws now in force relating to prosecutions of claims against the United States in the Court of Claims shall apply, as far as applicable, to the prosecution, practice, hearing, and determination of claims against the District of Columbia authorized to be prosecuted under the provisions of this act: Provided, That motions for new trials shall be made by either party within twenty days after the rendition of any judgment.

The motions for new trials mentioned in this proviso are the motions for new trials made in accordance with the modes of procedure at common law and provided for in the statutes and in the rules governing practice. Before this enactment the application for the new trial could have been made at any time during the term. The proviso requires it to be made within twenty days from the rendition of the judgment. This verbiage is upon the recognition that the Court of Claims, by rule prescribed by the Supreme Court (Rule 4, Court of Claims), is required to make and file their findings of facts and conclusions of law thereon in open court before or at the time they enter the judgment in the case. The verdict and the judgment run *pari passu*. In the district and circuit courts the rules generally provide that these motions shall be made within so many days after verdict. Here it is after judgment. This distinction is observed by what was said by Mr. Justice Brewer in delivering the opinion of the court in *Belknap* v. *United States* (150 U. S., 588, 590).

II.

But these motions for new trials, in the cases now before this court, were made under an entirely different statute. It is again noted that, prior to the passage of the act under which these motions for new trial were made, no statute nor written rule had provided for motions for new trials by the United States in suits brought against them in the Court of Claims. And further, the right of appeal was limited. The act of 1863 provided:

> That either party may appeal to the Supreme Court of the United States from any final judgment or decree which may hereafter be rendered in any case by said court wherein the amount in controversy exceeds three thousand dollars, under such regulations as the said Supreme Court may direct. (Sec. 5, ch. 92, 3d sess., 1863, 12 St., 766.)

By the act of June 25, 1868 (c. 71, 15 St., 75), it was enacted:

> SECTION 1. That an appeal to the Supreme Court of the United States shall be allowed on behalf of the United States from all the final judgments of the said Court of Claims adverse to the United States, whether such judgments shall have been rendered by virtue of the general or any special power or jurisdiction of said court under the limitations now provided by law for other cases of appeal from said court.
>
> SEC. 2. That said Court of Claims, at any time while any suit or claim is pending before or on appeal from said court, or within two years next after the final disposition of any such suit or claim, may, on motion on behalf of the United States, grant a new trial in any such suit or claim and stay the

payment of any judgment therein, upon such evidence (although the same may be cumulative or other) as shall reasonably satisfy said court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment the same shall be payable and paid as now provided by law.

Section 1 is section 707 of the Revised Statutes. Section 2 is section 1088 of the Revised Statutes.

These sections confer privileges and advantages upon the Government which are denied to the claimants. They are rules of practice established by the legislature, and therefore deemed necessary to protect the Government. They are to be given full construction, being conditions upon which, with others, claimants are permitted to sue the sovereign in its own courts. Immunity from suit is a prerogative of the National Government. That Government can be sued only in the manner and under the limitations permitted and prescribed by it. And when once extraordinary provisions for its protection have been enacted those provisions remain in force, and must be applied in all cases, unless expressly, or by irresistible implication, abrogated or waived.

There is also involved the familiar rule that the interpretation of a statute shall be such, if possible, as to avoid any repugnancy or inconsistency between it and other enactments of the same legislature. The provisions of section 1088 are applicable to the cases mentioned in the petitions for writs of mandamus, *first*, because by acts of Congress (c. 182, 20 St., 377, 410; c. 243, 21 St., 284; c. 134, 21 St., 458, 466) the United States has to pay a

moiety of judgments rendered against the District of Columbia under the act of 1880; and *second*, because these provisions are carried into the jurisdictional statute of 1880 (*ut sup.*) by sections 3 and 4. These subjects were fully considered by this court in *Johnson* v. *District of Columbia* (165 U. S., 330), and there is no repugnancy between this section 1088 and the proviso in section 4. The latter refers to the common-law proceeding of a new trial; the former to a distinct, peculiar, anomalous proceeding, wholly different in its characteristics from the usually designated new trial.

III.

But these motions are not made under the act of 1880. Kirby (No. 13) brought suit under that act, which was dismissed for want of prosecution. He made a motion for new trial under the act of February 13, 1895, which was allowed by the Court of Claims, upon the reasoning of *Follansbee* v. *District of Columbia* (32 C. Cls. R., 187). Upon this trial he obtained the judgment recited in the petition. Similarly, except that they had obtained a first judgment under the act of 1880, Cranford & Hoffman (No. 14) obtained a further judgment under the act of 1895. Now, there is no proviso in the act of 1895, limiting the time for making a motion for new trial after a judgment under that act. Of course, for legal grounds, that motion could be made by either party. If it could be maintained that the proviso in the act of 1880 repealed and abrogated the section 1088, yet, upon what principle can it be written into

the act of 1895? That would be a repeal by an implication upon an implication. Section 1088 was deliberately enacted for the safeguard of the Government. It can not thus be set aside.

But section 1088 is a good deal more than a motion for a new trial. Mr. Justice Brewer, speaking for this court, in *Belknap* v. *United States* (*sup.*), says:

> In order to give full effect to this statute the Court of Claims must have power to grant a new trial at a term subsequent to that at which the judgment was rendered, for it explicitly provides that it may be exercised at any time within two years. This section has been before the court in several cases, and in them its scope and effect considered and determined. *United States* v. *Ayres*, 9 Wall., 608; *United States* v. *Carsall*, 12 Wall., 175; *Ex parte Russell*, 13 Wall., 664; *Ex parte United States*, 16 Wall, 699; *United States* v. *Young*, 94 U. S., 258; *Young* v. *United States*, 95 U. S., 641, 642, 643.

In *Ex parte Russell* (*sup.*) the court, by Mr. Justice Bradley, said:

> But whatever reason Congress may have had for passing the act, of its right to pass it there is no question. The erection of the Court of Claims itself, and the giving to parties the privilege of suing the Government therein, though dictated by a sense of justice and good faith, were purely voluntary on the part of Congress; and it has the right to impose such conditions and regulations in reference to the proceedings in that court as it sees fit.
>
> The section in question was undoubtedly intended to give the Government an advantage, which, in respect to its form, is quite unusual, if not unprecedented, but which Congress undoubtedly saw suf-

ficient reason to confer. It authorizes the Court of Claims, on behalf of the United States, at any time while a suit is pending before or on appeal from said court, or within two years next after the final disposition of such suit, to grant a new trial upon such evidence as shall satisfy the court that the Government has been defrauded or wronged. The question is what is meant by the final disposition of the suit from which the two years of limitation is to date. And it seems to us there is hardly room for a doubt. Looking at the words in their collocation with the previous words, it seems evident that the final determination of the suit has reference to its final determination on appeal (if an appeal is taken), or if none is taken, then to its final determination in the Court of Claims. The natural meaning of the words leads to the same conclusion. The final determination of a suit is the end of litigation therein. This can not be said to have arrived as long as an appeal is pending. Neither the existence nor the determination of the appeal interferes with the right, on the part of the Government, to apply for a new trial; and, of course, the mandate from this court can not affect it.

It has been objected that the granting of a new trial after a decision by this court is, in effect, an appeal from the decision of this court. This would be so if it were granted upon the same case presented to us. But it is not. A new case must be made; a case involving fraud or other wrong practiced upon the Government. It is analogous to the case of a bill of review in chancery to set aside a former decree, or a bill impeaching a decree for fraud.

These remarks seem peculiarly fitted to the motions presented to the Court of Claims, which they declined to proceed with. These motions are, and of necessity

must be, motions to vacate judgments. They are made for error apparent on the face of the record in the court in which the judgments were rendered. The purpose of a bill of review for errors apparent is to have the court rendering the decree give the same relief that the appellate court might give under like circumstances. (*Prentiss* v. *Paisley*, 25 Fla., 927; *Evans* v. *Clement*, 14 Ill., 206.) And a motion for rehearing performs the same office, and such a remedy can be made effectual by these motions.

The object of these proceedings is "a naked and open daylight." In a number of cases judgments were rendered for large amounts, including interest for long periods. These judgments, principal and interest, have been paid. This court has decided (*Johnson* v. *District of Columbia*, 165 U. S., 330) that the parties were not entitled to this interest. If that part of the judgments is vacated, the defendants can recover those moneys. If the Court of Claims has jurisdiction, there can be no question it would correct the judgments.

And it is most proper this action should be taken in that court. The judgments, as to the interest part, are void. They might be collaterally assailed. But is it not better they should, in the manner sought, be disposed of by the court which entered them?

In *Foreman* v. *Carter* (9 Kans., 674) the judgment of foreclosure of mortgage was entered, and a sale of property made in 1863. In 1871 Carter moved to vacate said judgment because it was void for want of service. Judgment was set aside and sale adjudged void.

In *Outhwite* v. *Porter* (13 Mich., 533) the decree as to one of several defendants was set aside by the court, although he had never appeared for any purpose, because he had not been served with process.

In *Hersey* v. *Edmunds* (68 N. C., 243), which was a motion to set aside a judgment made four years after the rendition, the court said, speaking of judgments void for want of jurisdiction in the court:

> And so we conceive (if it be conceded that the judge had no power to give the judgment in vacation) this judgment might be likewise collaterally impeached and avoided, the want of jurisdiction appearing on its face, as by the amended record it would. This being so, there can be no reason why such a judgment may not be directly impeached and avoided and stricken from the records, either by the court *ex mero motu*, or at the instance of any person not interested in having it done. This was decided in *Winslow* v. *Anderson* (3 Dev. & Bat., 9), and we take it to be reasonable.

In *Pantall* v. *Dickey* (123 Penn. St.), the court said:

> If there was no lawful writ there was no jurisdiction of the alderman to entertain the case, and hence he could render no valid judgment. Of course, the judgment could have been and would have been reversed upon certiorari. But the judgment being void for want of jurisdiction to enter it, it matters not how, or in what mode, or at what time the objection on that ground is brought to the attention of a supervising court. Being void, it has no efficacy at any time. The defendant can afford to disregard it until an effort is made to enforce it. In this case a transcript was entered in the common pleas and a writ

of execution issued. Then the defendant moved to strike off the judgment, and one of the reasons assigned was the want of jurisdiction in the alderman. It was a valid reason; the facts appeared upon the record, and they were fatal to the judgment. We have frequently held that a judgment which was void upon its face may be stricken off on motion. *Allen* v. *Kripe*, 119 Pa., 1, and cases there cited.

Judgment reversed, and the rule to strike off the judgment in the court below is made absolute.

It is respectfully submitted that the matter set up in the return is not sufficient to warrant the Court of Claims in refusing to proceed with said motions, and that a peremptory mandamus should issue commanding that court to hear and determine the same.

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